

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELVIN GIRTON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER WEST LA,
Los Angeles, CA

*Docket No. 98-1243; Submitted on the Record;
Issued October 20, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of real estate appraiser.

On February 18, 1992 appellant, then a 40-year-old computer assistant, filed a claim alleging that he sustained injuries to his back while in the performance of duty. The Office accepted appellant's claim for a lumbar strain and a subsequent herniated disc at L4-5 and L5-S1. Appellant stopped work on February 18, 1992 and was subsequently placed on the periodic rolls. In 1994 appellant received vocational rehabilitation services and underwent training to become a real estate appraiser. Appellant successfully completed the education course and received a license to work as a real estate appraiser trainee. In November 1994, an Office rehabilitation counselor conducted a labor market study, which established that there were 2,367 appraisers employed in the Indianapolis area and that the average starting wage was \$360.00 per week. In early 1995, an assisted reemployment program was recommended but never initiated.

In a decision dated June 15, 1995, the Office terminated appellant's compensation benefits finding that the weight of the medical evidence of file established that appellant could return to his date-of-injury position as a computer assistant. This was subsequently vacated in a decision dated June 14, 1996. The Office reinstated appellant's compensation benefits from June 16, 1995.

By decision dated October 28, 1996, the Office determined that the selected position of real estate appraiser represented appellant's wage-earning capacity and was suitable for his accepted medical condition. The Office reduced appellant's compensation by 24 percent based on appellant's ability to earn wages as a full-time real estate appraiser at \$9.00 per hour or \$360.00 per week. By decision dated November 26, 1997 and finalized December 1, 1997, an

Office hearing representative affirmed the Office's October 28, 1996 decision that appellant's wage-earning capacity was properly represented by the position of real estate appraiser.

In a December 23, 1997 letter, appellant requested reconsideration. Although he stated that he had new evidence and a legal argument, which would show error, no such information was supplied. By decision dated January 6, 1998, the Office denied appellant's request on the grounds that appellant's letter neither raised substantive legal questions nor included new and relevant evidence and, thus, was insufficient to warrant a review of its decision.

In a January 5, 1998 letter, appellant again requested reconsideration. In support of his reconsideration request, appellant submitted a copy of the November 26, 1997 decision outlining his disagreement with various points in the margin of the decision; letters to his congressional representatives setting forth his disagreement with the Office's decision; the first page of a Form CA-1032 dated May 25, 1995; and a December 15, 1997 letter from Thomas Roundtree, vocational consultant, who worked on appellant's case. By decision dated January 26, 1998, the Office denied modification of its prior decision. The Office found that the new evidence and argument submitted was either unsubstantiated, duplicate or repetitive of arguments previously considered or actually refuted appellant's contentions of error on the part of the Office.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of real estate appraiser.

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.¹ If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances, which may affect his wage-earning capacity in his disabled condition.²

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*³ will result in the percentage

¹ 5 U.S.C. § 8115(a).

² *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

³ 5 ECAB 376 (1953).

of the employee's loss of wage-earning capacity. The basis range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.⁴

In this case, Dr. Arthur Lober, appellant's treating physician, indicated in an August 1, 1994 report that the recent MRI revealed a central disc herniation at L4-5 with no root compression. He noted there was bilateral facet arthropathy and at L5-S1 there was a small posterior midline herniation without neural impingement. Dr. Lober diagnosed multilevel degenerative disc disease with disc herniation at L4-5 causing minimal nerve root irritation. He opined that no further nonoperative treatment was indicated and that maximum medical improvement had been obtained. Permanent restrictions included no lifting over 10 pounds on more than an occasional basis with no frequent bending or stooping. A September 9, 1994 OWCP-5 form (work restriction evaluation) also set forth the above restrictions.

The rehabilitation specialist then determined that the position of real estate appraiser was within appellant's physical limitations and was available in suitable numbers to make it reasonably available to appellant within his commuting area. In an August 12, 1996 report, the rehabilitation specialist/counselor provided the position description of a real estate appraiser (DOT No. 191.267-010) and set forth the physical demands of the job, which according to the *Dictionary of Occupational Titles* (DOT), was classified as a light exertional job. The rehabilitation specialist referred to a previous study labor market survey of November 22, 1994, which set forth the availability of the selected position within appellant's commuting area and pay ranges within the geographical area. The rehabilitation specialist noted that the economic conditions in Indianapolis remained excellent with low unemployment and a strong job market. He concluded that as the economic conditions in Indianapolis have not declined since the November 22, 1994 wage estimation, it was his opinion that the weekly wage of \$360.00 remained an appropriate wage expectation for a real estate appraiser. The Office, therefore, found that appellant had the ability to earn \$360.00 a week as a real estate appraiser. The computation of appellant's gross computation for loss of wage-earning capacity was based on a weekly wage of \$9.00 per hour. Applying the *Alfred C. Shadrick* principles, the Office found that appellant had a 76 percent wage-earning capacity.⁵

The record establishes that appellant is physically capable to perform the work of a real estate appraiser and that the position is reasonably available. Moreover, the Office properly calculated appellant's wage-earning capacity based on the difference between his weekly wages at the time of the employment injury, \$435.20 and the average weekly wage of a real estate appraiser, \$360.00, using the *Shadrick* formula.⁶ Accordingly, the Board finds that the Office met its burden of proof in reducing appellant's compensation based on his wage-earning capacity as a real estate appraiser.

The record reflects that in August 1995 appellant started working as a real estate appraiser trainee with Independent Appraisals, Inc. and was released from his position in January

⁴ *Karen L. Lonon-Jones*, 50 ECAB ____ (Docket No. 97-155, issued March 18, 1999).

⁵ 5 ECAB 376 (1953).

⁶ See *Albert C. Shadrick*, *supra* note 3.

1997. Appellant argued that he is unable to obtain a job as a real estate appraiser trainee as no one would hire him without an assisted reemployment program. However, the fact that appellant only holds a trainee license and feels as though no one will hire him without a government subsidy, relates to hiring practices and does not establish that the position is unavailable in appellant's area. Moreover, the Board notes that the rehabilitation specialist indicated in his November 1994 report that appellant could be hired with his trainee license and, in fact, appellant was working with Independent Appraisals, Inc. in excess of a year with his trainee license and without the use of an assisted reemployment program.

Appellant also argued that he had been denied continuation/placement in the assisted reemployment program. Appellant asserted that he was never formally hired by Independent Appraisals, Inc. as they wanted to take advantage of the assisted reemployment program, which Thomas Roundtree, his vocational consultant, had given him permission to enter. Appellant asserted that he could not continue in his job with Independent Appraisals, Inc. as they needed to be reimbursed for part of his salary; no one would give him a job without funds from the assisted reemployment program; and he lost his last job because he did not bring in enough money to justify his position.

The Board notes that appellant's arguments pertaining to continued/placement in the assisted reemployment program have no bearing on his wage earning capacity. In this case, the assisted reemployment program monies were never authorized as the Office had found that appellant had no continuing disability in its decision of June 15, 1995. Although the Office later vacated the June 15, 1995 decision and reinstated compensation benefits in its June 14, 1996 decision, appellant had already started working as a real estate appraiser trainee with Independent Appraisals, Inc. Thus, any issue concerning authorization of the assisted reemployment program is moot.

The Board finds that Mr. Roundtree's letter of December 15, 1997 is of diminished probative value in supporting appellant's argument regarding placement in the assisted reemployment program. In his December 15, 1997 letter, Mr. Roundtree, vocational consultant, stated that, "as far as I am aware, [appellant] was never formally employed by Independent Appraisals, as that company, upon contingency of hiring, was wanting to avail themselves of Assisted Reemployment monies. In addition, [appellant's] case was recommended for closure based upon additional medical information from OWCP." The record reflects that, in a February 21, 1995 letter, Mr. Roundtree advised Independent Appraiser's, Inc. that the first ninety days of job placement services authorized by the Department of Labor would end on March 6, 1995. He additionally stated that it might impact the availability of the assisted reemployment monies available. In a March 7, 1995 letter to appellant, Independent Appraiser's forwarded a noncompete contract to appellant and appellant commenced employment with this company on August 21, 1995. On June 2, 1995 Mr. Roundtree closed out appellant's case file. Accordingly, Mr. Roundtree's contention in his December 15, 1997 letter that the company was availing itself of assisted reemployment monies is contrary to facts of this case as the company proceeded to hire appellant after knowing that the assisted reemployment monies might be affected. Moreover, Mr. Roundtree closed out appellant's case in June 1995, which was prior to appellant commencement of employment in late August 1995. Thus, Mr. Roundtree would have

no knowledge of appellant's employment with Independent Appraisers, Inc. Accordingly, Mr. Roundtree's letter of December 15, 1997 has diminished probative value.

The Board further notes that appellant's other allegations and the submission of the front page of the May 25, 1995 Form CA-1032 are either immaterial, irrelevant, or unsubstantiated. Furthermore, appellant contradicted his own assertions he set forth in his letter for reconsideration and in his letters to his congressional representatives by noting that the Office's statements in the November 26, 1997 hearing representative's decision were "not true."

The decisions of the Office of Workers' Compensation Programs dated January 26 and January 6, 1998 and December 1, 1997 are hereby affirmed.

Dated, Washington, DC
October 20, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member